

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of April, two thousand and eight.

PRESENT:

HON. PIERRE N. LEVAL,
HON. GUIDO CALABRESI,
Circuit Judges,
HON. ALAN H. NEVAS,
*District Judge.**

SERGEY MORGORICHEV, _____

Petitioner-Appellee,

-v.-

No. 00-2406-pr

MICHAEL B. MUKASEY,¹

Respondent-Appellant.

* The Honorable Alan H. Nevas, of the United States District Court for the District of Connecticut, sitting by designation.

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey has been substituted for former Attorney General John Ashcroft as the respondent in this case.

1 FOR PETITIONER-APPELLEE:

DANIEL B. LUNDY, Barst & Mukamal,
LLP, New York, N.Y.

4 FOR RESPONDENT-APPELLANT:

SCOTT DUNN, Assistant United States
Attorney (Varuni Nelson, Dione M. Enea, *of*
counsel), *for* Benton J. Campbell, United
States Attorney for the Eastern District of
New York, Brooklyn, N.Y.

11 **UPON DUE CONSIDERATION** of this petition for review of a decision of the Board
12 of Immigration Appeals (“BIA”), it is hereby **ORDERED, ADJUDGED, AND DECREED** that
13 the petition for review is **DENIED**.
14

17 In 1993, Sergey Morgorichev, a lawful permanent resident of the United States, was
18 convicted, following a jury trial, of conspiring to distribute and possess with intent to distribute
19 heroin, in violation of 21 U.S.C. § 846. He was sentenced to sixty-three months’ imprisonment,
20 followed by a four-year term of supervised release. In 1997, the Immigration and Naturalization
21 Service (“INS”) initiated deportation proceedings against Morgorichev, charging him as an alien
22 who had been convicted of an aggravated felony and of a violation of law relating to a controlled
23 substance. 8 U.S.C. § 1227(a)(2)(A)(iii) & (a)(2)(B)(i). The Immigration Judge (“IJ”) found
24 Morgorichev deportable and ineligible for relief under section 212(c) of the Immigration and
25 Nationality Act (“INA”). The BIA affirmed on June 9, 1998. *In re Morgorichev*, No. A23 371
26 786 (B.I.A. June 9, 1998), *aff’g*, No. A23 371 786 (Immig. Ct. N.Y. City May 30, 1997).

27 In 1998, Morgorichev filed a habeas petition in the Eastern District of New York, arguing
28 that the BIA and the IJ erred in retroactively applying the limitations on section 212(c) relief
29 enacted by Congress in 1996.² The district court granted the habeas petition on June 20, 2000,

² In 1996, section 440(d) of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214, 1227 (Apr. 24, 1996), limited the availability of 212(c) relief for aliens convicted of aggravated felonies. Later that year, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (Sept. 30, 1996). Section 304(b) of IIRIRA repealed INA section 212(c).

1 and the government appealed. The appeal has been held in abeyance pending the decisions of
2 this Court in *Calcano-Martinez v. INS*, 232 F.3d 328 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001),
3 *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001), as well as in *Rankine v.*
4 *Reno*, 319 F.3d 93 (2d Cir. 2003). We assume the parties' familiarity with the facts, procedural
5 history, and scope of the issues presented on appeal.

6 During the pendency of this appeal, Congress passed the REAL ID Act of 2005, Pub. L.
7 No. 109-13, Div. B, 119 Stat. 231, 302 (May 11, 2005), "significantly affect[ing] the procedure
8 for disposing of a habeas petition that . . . challenged a final order of removal." *Wilson v.*
9 *Gonzales*, 471 F.3d 111, 116 (2d Cir. 2006). We have held that in these cases the appeal is
10 converted to a petition for review brought under 8 U.S.C. § 1252. *Id.* In so doing, we review the
11 underlying deportation order, "vacating as a nullity the district court's decision below." *Moreno-*
12 *Bravo v. Gonzales*, 463 F.3d 253, 257 (2d Cir. 2006). And, as a petitioner's eligibility for a
13 section 212(c) waiver "is a question of law, unlike the discretionary and unreviewable decision of
14 whether such a waiver ultimately should be granted," our review of the issue is *de novo*. *Blake v.*
15 *Carbone*, 489 F.3d 88, 98 n.7 (2d Cir. 2007).

16 The government contends that this case is squarely covered by our decision in *Rankine*,
17 319 F.3d at 99-100, in which we determined that the congressional elimination of section 212(c)
18 relief is not impermissibly retroactive as applied to those aliens who, after trial, were convicted
19 of aggravated felonies before 1996. We reached this conclusion in the case of Rankine and his
20 co-petitioners on the ground that, unlike aliens who had *pled* guilty to aggravated felonies, these
21 aliens had not relied on the availability of such relief.³ Morgorichev challenges our rationale in

³ Morgorichev does not contend that he delayed seeking 212(c) relief relying on the continued availability of such relief, an argument that remains open to such litigants post-*Rankine*. See *Restrepo v. McElroy*, 369 F.3d 627, 634-35 (2d Cir. 2004); see also *Walcott v. Chertoff*, 517 F.3d 149, 154-55 (2d Cir. 2008).

1 *Rankine* as in conflict with the Supreme Court’s retroactivity analysis in *Landgraf v. USI Film*
2 *Products*, 511 U.S. 244 (1944), and in violation of principles of equal protection.

3 These arguments are unavailing. The Court’s decision in *Rankine* addresses both issues.
4 See *Rankine*, 319 F.3d at 98, 103. And we are bound by *Rankine* “unless and until its rationale is
5 overruled, implicitly or expressly, by the Supreme Court or this court *en banc*.” *In re*
6 *Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (quotation marks omitted).

7 Morgorichev further contends that the regulation implementing the various forms of
8 section 212(c) relief, see 8 C.F.R. § 1212.3(g), violates equal protection by determining
9 eligibility for section 212(c) relief for criminals, otherwise similarly situated, based on the timing
10 of the commencement of their deportation proceedings. The regulation, however, is a
11 permissible implementation of Congress’s intention in passing the Antiterrorism and Effective
12 Death Penalty Act (“AEDPA”), which, as we have held, was precisely to effectuate this line-
13 drawing. See *Henderson v. INS*, 157 F.3d 106, 130 (2d Cir. 1998). Although Morgorichev
14 argues that the government might have manipulated the timing of proceedings in order to prevent
15 aliens from receiving 212(c) relief, we note that the record does not demonstrate any
16 unreasonable delay in the commencement of Morgorichev’s deportation proceedings.

17 We have considered all of Petitioner-Appellee’s claims and find them to be without
18 merit. For the foregoing reasons, we VACATE the district court’s grant of habeas, and DENY
19 the petition for review.

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23 FOR THE COURT:

24 Catherine O’Hagan Wolfe, Clerk of Court

25 By: _____
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